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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No 471

JOHN JACOB SAMARIN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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September 8, 1964.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petitioner, John Jacob Samarin, prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The United States District Court for the Southern District of Florida entered no opinion, petitioner having been convicted in that court, following a jury trial, of: (1) the transportation of counterfeit securities in foreign commerce, in violation of 18 U.S.C. 2314; and (2) conspiracy to violate the aforesaid statute, as prohibited by 18 U.S.C. 371 (R. 9).[1]

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[1] References to the two volume mimeographed record in the Court of Appeals for the Fifth Circuit are designated herein as "(R.)."

Motions for a mistrial and for a directed verdict of acquital were denied by the District Court from the bench without written opinion (R. 555-565 and R. 594-596). The *per curiam* opinion of the Court of Appeals is reported at 331 F. 2d 601 (C.A. 5, 1964), and a copy thereof is attached to this petition as Appendix A.

Jurisdiction

The judgment of the Court of Appeals was entered on May 5, 1964. A timely motion for rehearing was denied by the Court of Appeals on July 8, 1964. Upon application of the petitioner, Mr. Justice White, on August 4, 1964, ordered that the time for filing a petition for writ of certiorari be extended to and including September 7, 1964. That date being Labor Day, a national holiday, this petition was filed on September 8, 1964.

Jurisdiction of the District Court was based on 18 U.S.C. 3231. Jurisdiction of the Court of Appeals rested on 28 U.S.C. 1291. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

This case presents for decision two questions. These are:

1. Did the Court of Appeals err in sustaining the trial court's denial of petitioner's motion for directed verdict of acquital, in that there was no evidence to prove the transportation in foreign commerce, between Miami, Florida and Nassau, Bahama Islands, of the 265 counterfeited Ohio Turnpike revenue bonds which were introduced in evidence by the prosecution and which were the subject matter of the indictment.

2. Did the Circuit Court of Appeals err (and was peti-

tioner prejudiced thereby) in sustaining the trial court's denial of timely motions for mistrial and for directed verdict of acquital made by counsel representing the co-defendant, where the motions were directed to comment by the prosecution and admission of evidence respecting a co-defendant's refusal to answer an F.B.I. agent's questions about the offenses charged, and where counsel for this petitioner joined in the motion for mistrial.

Statutes and Constitutional Provision Involved

18 U.S.C. 371 reads in part as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * * * * * *

18 U.S.C. 2314 provides in pertinent part as follows:

> * * * * * * *
>
> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited;
>
> * * * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
>
> * * * * * * *

Amendment Five to the Constitution of the United States provides as follows:

> "Amendment V. Grand Jury Indictment for Capital Crimes
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

18 U.S.C. 3481 provides as follows:

> In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

Statement of the Case

1. *Proceedings in the Trial Court.* On August 23, 1962 an indictment was returned against the petitioner and two other defendants. The indictment contained two counts. The first charged a violation of 18 U.S.C. 2314 by the unlawful transportation in foreign commerce from Miami Beach, Florida to Nassau, Bahama Islands, of counterfeited securities, represented by 265 counterfeited $1,000 State of

Ohio Turnpike revenue bonds, payable June 1, 1992, and bearing serial numbers M13205, M132053 to and including M132121, M132127 to and including M132177, M132179 to and including M132322 (R. 2). The second count charged a conspiracy under 18 U.S.C. 371 on the part of the petitioner and the two other defendants to commit the above-stated violation of 18 U.S.C. 2314. (R. 3). The trial court appointed counsel for the petitioner one day before trial. Trial before a jury in the United States District Court for the Southern District of Florida commenced on December 3, 1962, and was completed on December 13, 1962.

The petitioner and one other defendant were convicted on both counts, while the third defendant was acquitted (R. 7-10). Petitioner was sentenced to five years imprisonment on each count, the sentences to run concurrently (R. 10). The other convicted defendant was sentenced to three years imprisonment on the conspiracy count, but was placed on probation for three years as to the substantive count (R. 8).

2. *Evidence Allegedly Connecting the Petitioner With the Conspiracy and With the Unlawful Transportation in Foreign Commerce.* The Government's evidence showed that the petitioner very briefly came into possession of a genuine Ohio Turnpike revenue bond some time in the middle of October, 1960 (R. 361). Petitioner maintained (R. 440-442), and his story was corroborated (R. 570-571), and uncontradicted that he purchased the aforesaid revenue bond in behalf of one Fox after a third party had recommended several different bonds for purchase by Fox. Fox told the petitioner to pick up the bond and then sent the money for its purchase to the petitioner through a third party. Fox received the bond the next day, the petitioner having transmitted it through the third party (R. 572). Three days later, Fox traded the bond for a half interest

in marine diesel engines owned by the third party (R. 571-573).

The Government's evidence also showed that in the summer of 1960, the petitioner had asked a Cleveland broker for an Ohio Turnpike bond in "street form," explaining that he wanted to counterfeit a bond. (R. 72). The evidence also indicated that in October and again in November of 1960 the petitioner approached three Cleveland printers to ask if they could print "certificates" or "bonds." (R. 174, 175, 185). There was no evidence introduced to establish that any printer made a counterfeit bond or bonds for the petitioner or for any of the other defendants, either in October or November, 1960, or at any time.

It was shown by the evidence that the petitioner knew one of the co-defendants, Marroso by name, having met the latter in connection with lawful and legitimate transactions in Ohio. These meetings occurred in June, 1960, some six months prior to the unlawful transportation of the counterfeit bonds charged in the indictment (R. 397-398, 401, 402).

The Government's evidence demonstrated that the 265 Ohio Turnpike revenue bonds which were introduced in evidence at the trial were made from the genuine Ohio Turnpike bond which very briefly had been in the possession of the defendant in October, 1960. (R. 521-524, 532). A number of other persons had possession of, or access to, this bond both prior and subsequent to the time petitioner had possession of it (R. 571-573).

The last piece of evidence relied upon by the Government against the petitioner was the fact that on or about January 3, 1961, a telephone call was placed from the Miami, Florida hotel room of the co-defendant Marroso to a party named "Samarin" in Cleveland. At that time, the petitioner was living in a house whose telephone was assigned

the number to which the Miami call had been placed (R. 391, 395-396).

There was no evidence introduced by the United States to establish that the petitioner actually transported, or assisted in the transportation of, 265 counterfeited Ohio Turnpike revenue bonds, as charged in the indictment, from Miami, Florida to Nassau, Bahama Islands, on or about January 9, 1961. Nor was there evidence to prove that the 265 counterfeited Ohio Turnpike revenue bonds, as expressly enumerated and set out in the indictment, which were sold through a Nassau banker, Green, the co-defendant who was acquitted, to innocent purchasers for value in the Bahamas in early January, 1961, were the same Ohio Turnpike revenue bonds as those which had been in the possession of the two co-defendants, not including the petitioner, in Miami, Florida during the period December 26, 1960 through January 9, 1961. There was no evidence, either, to show that the counterfeited bonds were printed in the United States rather than in the Bahamas, or elsewhere. No identification was ever made of the serial numbers on the 266 bonds which were in the possession of the two other co-defendants in Miami in late December of 1960 and early January of 1961, other than that such bonds were within the 132,000 series among the bonds issued by the Ohio Turnpike Authority. Nor was there any proof offered that the Miami bonds were counterfeit. The 266 bonds that appeared in Miami were part of a series (the 132,000 series) consisting of one thousand (1,000) bonds. The 265 counterfeit bonds which were sold in the Bahamas and which form the subject matter of indictment and which were identified by serial number, also formed part of the 132,000 series.

3. *The Evidence Asserted Against the Convicted Co-defendant.* This petitioner will not attempt to provide here

any detailed statement of the evidence on which the prosecution relied in its case against the other co-defendant, Marroso, who was convicted along with the petitioner and whose conviction also was upheld by the Court of Appeals (App. A). On August 8, 1964, Marroso filed a petition for certiorari with this Court, No. 372, October Term, 1964. Petitioner accepts and incorporates by reference herein that portion of Marroso's "Statement" appearing at pages 6-7 of his aforesaid petition for certiorari. Petitioner, however, notes also the fact that as to Marroso, as in his own case, there was no proof offered to identify the bonds appearing in Miami in late December, 1960 as counterfeit, or as the same bonds which were sold by Green, the acquitted defendant, in Nassau in January, 1961.

Prior to the indictments which were returned against the defendants in this case, an agent of the Federal Bureau of Investigation interrogated Marroso in Detroit, Michigan, where the latter had his place of business (R. 445-446). Marroso was accompanied to the interview by his own attorney (R. 446). Marroso answered some questions put to him by the agent. Then the F.B.I. man asked him why he had been in Florida during the c[illegible]ical period when Ohio Turnpike bonds appeared in that city. Marroso asked to be excused to consult his attorney who was in the next room. On his return, Marroso explained that his attorney had instructed him not to answer any more questions. This terminated the interview (R. 446).

During the course of the prosecution's opening statement, counsel for the Government mentioned that Marroso, when being interviewed by the F.B.I. agent, had refused to answer any more questions on advice of his counsel (R. 26). Marroso's trial counsel immediately moved for a mistrial "on the grounds of prejudicial remarks made by Government counsel" during the course of his opening statement.

The motion was promptly denied from the bench (R. 26).

The agent of the Federal Bureau of Investigation who interviewed Marroso in Detroit, was called as a witness for the prosecution (R.444). During the course of the trial the Court ruled that an objection in behalf of one defendant would be taken as an objection for all. Prior to the agent taking the stand, counsel for Marroso asked the Court to caution Government counsel against commenting on, or adverting to, the fact that his client had refused to answer questions put to him by the F.B.I. agent on the advice of his counsel (R. 414). The Court refused so to caution Government counsel (R. 415). Thereafter, the agent testified concerning his Detroit interview of Marroso, including the fact that Marroso had refused to answer questions on advice of counsel (R. 446).

4. *Certain Motions in the Trial Court.* When the Government rested its case, counsel for all the defendants moved for judgments of acquittal under both counts of the indictment (R. 548-564). These were denied from the bench at the conclusion of short oral argument (R. 565). Finally, when all the evidence was in, all motions for judgment of acquittal were renewed and again denied from the bench (R. 593). Counsel for Marroso also renewed, and counsel for the instant petitioner at this time also joined in, a motion for mistrial based on the admission of the testimony of the agent of the Federal Bureau of Investigation regarding his interview of Marroso (R. 594). Judge Choate once more denied the motion in a ruling from the bench (R. 596).

Reasons for Granting the Writ

Petitioner seeks certiorari to review the affirmance by the United States Court of Appeals for the Fifth Circuit both (a) of his conviction in the trial court of a violation

of 18 U.S.C. 2314, and (b) of his conviction, under 18 U.S.C. 371, of conspiracy to violate the aforesaid section. In brief, the grounds on which his request for the writ of certiorari rest are: (1) the petitioner's conviction lacks the requisite evidentiary support, *Thompson* v. *City of Louisville*, 362 U.S. 199 and *Washington* v. *United States*, 357 U.S. 348, in that there was a failure to prove beyond a reasonable doubt an essential element of the crime with which he was charged, namely, the transportation in foreign commerce of the counterfeited bonds which form the specific gravamen of the indictment and which were introduced in evidence against the petitioner. *Christoffel* v. *United States*, 338 U.S. 84, 90; and (2) the sanctioning by Judge Choate of a substantial impairment of the co-defendant's privilege against self-incrimination permitted the prejudicial use against the petitioner, as well as the co-defendant, of improper and highly damaging testimony, *McDonald* v. *United States*, 335 U.S. 451, 456. In more detail, petitioner's reasons are:

A. *Illegal Transportation In Foreign Commerce Was Not Proved.* The statute with which the defendants were charged of having violated, 18 U.S.C. 2314, provides in pertinent part as follows:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited;
>
> * * * * * * *

Under the statute in question clearly the Government is obliged to prove, beyond a reasonable doubt, all the elements of the offense prescribed thereby, including the

transportation in foreign commerce of counterfeited securities. At trial, there was no direct evidence whatsoever that either the petitioner or any of the two co-defendants actually transported counterfeit bonds from Florida to Nassau. The Government relied exclusively upon circumstantial evidence purporting to show: (1) that 265 counterfeit bonds had been sold by one of the co-defendants (who was acquitted by the jury) in Nassau in January, 1961; and (2) that two of the co-defendants, but not the petitioner, had possession of 266 Ohio Turnpike bonds coming within the same general series (the 132,000 series) as the counterfeit bonds, in Miami, Florida, in late December of 1960. However, no proof at all was offered by the prosecution to show that the 265 bonds which were sold in Nassau were the same bonds that had been in the possession of Marroso and the other alleged co-conspirator in Miami, Florida in late December, 1960. Nor is there any proof that the bonds that appeared in Miami during the period stated were counterfeit bonds, or that the bonds found in Nassau had been counterfeited in the United States, rather than in Nassau or some other foreign jurisdiction. It is elementary that an essential part of a fair procedure resulting in the conviction of a crime is that all the elements of the crime charged shall be proved beyond a reasonable doubt. *Christoffel* v. *United States*, 338 U.S. 84, 90. In the instant case, the indispensable element of unlawful transportation, as charged in the indictment, was not so proved.

The petitioner is aware that this Court ordinarily will not grant certiorari "to review or to discuss specific facts." Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (Wolfson & Kurland Ed., 1951), § 333; *United States* v. *Johnson*, 268 U.S. 220, 227. On the other hand, the Court has not hesitated to grant certiorari, even

in cases coming to it from state courts of last resort, to review the sufficiency of the evidence in criminal cases where the conviction under review was so totally devoid of evidentiary support as to result in gross unfairness. *Thompson* v. *City of Louisville*, 262 U.S. 199; *Garner* v. *Louisiana*, 368 U.S. 157, 163. Such unfairness exists here.

Petitioner also suggests that this Court may have a special obligation to preserve the standards of fair criminal procedure and the sufficiency of the evidence to support a conviction when the conviction reviewed is one arising out of a federal conspiracy case. As this Court has observed, the "modern law of conspiracy is largely evolved by the judges." *Krulewitch* v. *United States*, 336 U.S. 440, 446. Under indictments charging criminal conspiracy, opportunities abound, unless trial and reviewing courts are vigilant, to convert the crime of conspiracy into a "drag-net to draw in all substantive crimes,", *Ingram* v. *United States*, 360 U.S. 672, 680, "by piling inferences upon inferences . . .", *District Sales Co.* v. *United States*, 319 U.S. 703, 711. To permit, as occurred in this case, the Government to omit offering any proof that specific securities which were sold outside of the United States were the same securities as those which earlier were in the possession of one of the defendants within the United States is to abuse the liberality which the federal courts have tolerated in establishing conspiracy convictions.

Such misapplication of the federal judicial power appears even more regretable in petitioner's case. Absence of proof of illegal transportation apart, his nexus with the alleged unlawful transportation of the counterfeited bonds, as charged in the indictment, is at best extremely tenuous. Even conceding, however, that it would be enough if proof of the actual transportation of the counterfeit bonds listed in the indictment were established, lacking

such indispensable proof, the decision below should be reviewed by this Court in the exercise of its supervision over federal criminal procedure, and reversed "because of insufficiency of the evidence," *Washington* v. *United States*, 357 U.S. 348.

B. *Petitioner Was Prejudiced By the Admission of Evidence in Violation of His Co-defendant's Privilege Against Self-incrimination.* This petitioner concurs with, and in general associates himself in, the arguments expressed in the petition for certiorari filed in *Marroso* v. *United States*, No. 372, October, 1964 Term. That petition sets out, at pages 6 and 7 thereof, the facts of record on the basis of which it is established, we believe, that the prosecution's comments on Marroso's failure, on advice of counsel, to answer questions put to him by an agent of the Federal Bureau of Investigation, and the subsequent admission into evidence of the agent's testimony to that effect, offended Marroso's constitutional privilege against self-incrimination, violated 18 U.S.C. 3481,[2] and were gravely prejudicial to Marroso's right to a fair trial.

It has long been the law, at least in the federal courts, that comments by the prosecution regarding the failure of a defendant to testify constitute reversible error. *Wilson* v. *United States*, 149 U.S. 60; *Bruno* v. *United States*, 308 U.S. 287, 292; *Stewart* v. *United States*, 366 U.S. 1. Uniform decisions to the same effect among the Circuit Courts of Appeal are legion; see e.g., *Milton* v. *United States*, 119 F. 2d 556, 558, 71 App.D.C. 394 (1940,; *United*

[2] 18 U.S.C. 3481 states that:

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

States v. *Sprengel*, 103 F. 2d 876, 883 (C.C.A. 3, 1939); *Ing* v. *United States*, 278 F. 2d 362, 367 (C.A. 9, 1960); and *United States* v. *Ragland*, 306 F. 2d 732, 736 (C.A. 4, 1962). Indeed, the Court of Appeals for the Fifth Circuit itself recently, in *DeLuna* v. *United States*, 308 F. 2d 140, 154 (C.A. 5, 1962), held, in a comprehensive and singularly illuminating opinion by Judge Wisdom tracing the increasingly more complete protection afforded by the Fifth Amendment, that comment by a defense counsel regarding the failure of a co-defendant (not his client) to testify constituted prejudice to such co-defendant which could not be cured by any instructions.

So as far as Marroso is concerned, therefore, the pertinent rulings below would appear to depart from authoritative holdings of this Court and conflict with a host of decisions by other Circuit Courts, as well as with the Fifth Circuit's prior decision in the *DeLuna* case, *supra*. The fact that Marroso availed himself of his privilege during the investigative phase of these proceedings, before the indictments were returned, is of no distinguishing consequence. *Counselman* v. *Hitchcock*, 142 U.S. 547; *Petition of Groban*, 352 U.S. 330. To the contrary, it has been held that a witness in an investigative proceeding, even one who may be a prospective defendant, must claim his privilege against self-incrimination at his peril as particular questions are asked of him. *In Re Turner*, 309 F. 2d 69, 71 (C.A. 2, 1962). This is what Marroso did, acting upon advice of counsel.

Any doubt as to the applicability of the general doctrines respecting the privilege has been dispelled by this Court's very recent landmark decision in *Escobedo* v. *Illinois*, 378 U.S. 478. There, in an opinion by Mr. Justice Goldberg, it was held that when an investigatory proceeding "focuses on the accused" then "our adversary system begins to oper-

ate" and, that at such time "the accused must be permitted to consult with his lawyer." In *Escobedo*, as in the instant case, the pertinent interrogation "was conducted before petitioner was formally indicted." If, under the circumstances presented, the Constitution gave Marroso (1) the right to consult with his lawyer, and (2) the right to invoke his privilege of remaining silent or refusing to answer, *a fortiori* it would appear to forbid at trial any impairment of that right to remain silent on advice of counsel with whom he had consulted before replying to his interrogator.

Concededly, the right against self-incrimination, and perhaps also the right guaranteed by 18 U.S.C. 3481, are personal to the witness who relies on them. *Rogers v. United States*, 340 U.S. 367, 371; *Hale* v. *Henkel*, 201 U.S. 43, 69. Therefore, if Marroso had waived rights guaranteed him by the Fifth Amendment and by the statute referred to above, that would have put an end to the matter, so far as this petitioner is concerned. Obviously, he could not rely on constitutional or statutory rights which were personal to a witness or to a defendant who had waived such rights or failed to assert them in time.

However, that is not this case. Moreover, as Mr. Justice Douglas has said, under "our system of government, the police cannot compel people to furnish the evidence necessary to send them to prison." *Breithaupt* v. *Abram*, 352 U.S. 432, 443. Nor do we believe that other people should be sent to prison on the basis of evidence which another was unlawfully compelled to furnish the authorities. The constitutional protection against self- incrimination is "not to be interpreted in [such] a hostile or niggardly spirit." *Ullman* v. *United States*, 350 U.S. 422, 426.

Assuming, therefore, that Marroso's rights were violated by what occurred during the trial, the further question is whether the petitioner can complain of the results of such

violations when they have an adverse impact on his own defense? We find no case squarely in point. However, persuasive analogy lies in this Court's decision in *McDonald* v. *United States*, 335 U.S. 451, 456. That case involved the joint trial of two defendants charged with operating an illegal lottery. Articles seized by the police were admitted in evidence over the objection that the evidence had been obtained in violation of the Fourth Amendment. This Court held that the seizure had been unconstitutional and that, therefore, the co-defendant who owned the premises upon which the illegal search and seizure had taken place was entitled to a reversal of his conviction. However, since the unlawfully seized evidence had been introduced against both defendants, the Court was required to consider whether the evidence had been properly used against the defendant, who "had no right of privacy that was broken" by the search, 335 U.S. at 456. Finding prejudice to this defendant, the Court held his conviction should be reversed also. See also *Weiss* v. *United States*, 308 U.S. 321, 330, where evidence introduced in violation of Section 605 of the Federal Communications Act was not permitted to be used against several co-conspirators even though other co-conspirators had consented to its introduction.

Surely, the privilege against self-incrimination provided by the Fifth Amendment is no less important than the Fourth Amendment's prohibition against unreasonable search and seizure. If evidence obtained in violation of either one of these constitutional safeguards substantially prejudices a defendant, even though he is not the person who would have been entitled to claim the constitutional privilege in the first instance, he should, nevertheless, be able to object to the use of such evidence against him. Any other result, as this Court put it in *Jones* v. *United States*, 362 U.S. 257, 263, would not be "consonant with the ameni-

ties, to put it mildly, of the administration of criminal justice . . . .".

Nor can it be argued that any harm to this petitioner as a consequence of the introduction of the evidence in question was cured by appropriate instructions from the trial court to the jury. On the contrary, the trial court's instructions, however technically correct they might appear, did not exorcise, but rather exacerbated, the resulting harm. Judge Choate expressly admonished the jury as follows:

> If and when it does appear from the evidence that a conspiracy existed, if it does so ever appear, and that a defendant was one of the members, then the acts thereafter knowingly made by any person likewise found to be a member, may be considered by the jury as evidence in the case as to every defendant found to have been a member, even though the acts and statements were made or occurred in his absence and without the knowledge of the defendant, provided always, however, such acts and statements were knowingly done and made during the continuance of the conspiracy and in furtherance of the object or purpose of such conspiracy (R. 627).

Under that instruction, the adverse inference that members of the jury almost surely must have drawn from Marroso's refusal to answer the federal agent was almost as certainly extended to the petitioner. If the challenged evidence was improperly admitted against Marroso, then the rationale and result in *McDonald*, *supra*, require the conclusion that it was improperly admitted as to petitioner.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted. Petitioner also respectfully requests that the Court grant the petition for writ of certiorari filed in *Marroso* v. *United States*, No. 372 this Term, and that both cases be consolidated for argument on the merits.

Respectfully submitted,

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September 8, 1964.

APPENDIX A

May 5, 1964

Before BELL, Circuit Judge and INGRAHAM,* District Judge.

PER CURIAM: Appellants were convicted of a conspiracy to transport counterfeit securities in foreign commerce in violation of 18 USCA, § 371, and 18 USCA, § 2314. Both appellants contend their convictions are invalid, because the lower court erred in admitting into evidence post conspiracy statements of co-defendants. In addition, the appellant Marroso contends that the lower court erred in failing to grant his motion for mistrial because of the admission into evidence of the testimony of an F.B.I. agent concerning the termination by Marroso of an interview with the agent on advice of counsel.

After a careful examination of the entire record, we find to the contrary. The evidence sustained the conviction of both appellants. A common purpose and plan may be inferred from a development and a collocation of circumstances. *Glasser v. United States*, 315 U.S. 60 (1942). It is well settled that, in a joint trial, post conspiracy declarations by co-defendants are admissible against the declarant under proper limiting instructions. *Delli Paoli v. United States*, 352 U.S. 232 (1957). The court gave precise limiting instructions both prior to the receipt of the statements and in the final charge.

Lastly, it was not error to fail to grant the motion for mistrial because of the admission into evidence of the testimony of the F.B.I. agent concerning his interview with Marroso wherein Marroso answered certain questions and

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* Judge Cameron, the third judge constituting the Court originally hearing this case, died after argument but before decision. Consequently, this decision and opinion is rendered by a quorum pursuant to Title 28 USCA, § 46(c) and (d).

then refused to answer further questions on advice of counsel. This was no more than evidence of surrounding circumstances tending to illuminate the principal fact in such a way as to reflect the entire transaction or conversation and place the whole in a true light.

The convictions are AFFIRMED.

(2403-4)